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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 415

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR HENRY A. SCANDRETT, ET AL., INTERVENING DEFENDANTS, APPELLEES.

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THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Opinions Below.

The decision of the specially constituted District Court (R. 422) is reported in 21 Fed. (Supp.) 151. The first report of the Interstate Commerce Commission (R. 33), *Pooling of Ore Traffic in Wisconsin and Michigan,* is reported in 210 I. C. C. 599. The second report (R. 7), *Pooling of Ore Traffic in Wisconsin and Michigan,* is reported in 219 I. C. C. 285. This latter report and the decision of the specially constituted District Court are set forth in the appendix to this brief.

Statute Involved.

Section 5 (1) of the Interstate Commerce Act reads as follows:

> "That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises."

Questions Presented.

The controversy involves the validity of an order of the Interstate Commerce Commission, authorizing the pooling of interstate ore traffic from the Menominee Range in Michigan and Wisconsin, to Escanaba, Michigan, and division of earnings on class and commodity traffic to and from points on the lines of the Escanaba and Lake Superior Railroad Company. In appellant's brief, the issues have

been narrowed down until substantially the only question for determination is:

Whether appellant is a "carrier involved" in the pooling agreement within the meaning of Section 5 (1) of the Interstate Commerce Act.

Statement of the Case.

There is no inconsistency between the findings of fact made by the specially constituted District Court and the facts as found by the Commission and recited in its report. For its statement of the case, appellant has adopted the findings of fact made by the Court below, except finding No. 14 and in addition thereto, sets out four paragraphs of additional statement, for which record references are shown. The intervening defendants, appellees herein, adopt the findings of the District Court and make the following additions to the case as stated by appellant, with reference to the page of the transcript of the record, from which such statements are taken.

(For convenience, the Chicago and North Western Railway Company, its Trustee and its wholly owned but separately incorporated subsidiary, the Escanaba, Iron Mountain and Western Railroad Company, will hereinafter be collectively referred to as "North Western", and Chicago, Milwaukee, St. Paul and Pacific Railroad Company and its Trustees will hereinafter be referred to as "Milwaukee".)

The contract between North Western and Milwaukee approved by the Commission, is identified as Exhibit No. 1 and is set out in full in the transcript of record. (R. 316-348.)

The ore tonnage handled by each of the two companies during the ten year period, 1923-1932, inclusive, was studied and it was concluded it would be fair to divide the pooled

revenue of the future on the basis it had actually been earned, in the ratio of their respective earnings during the study period. The North Western's proportion in that period was 66 per cent and the Milwaukee's 34 per cent. (R. 122.)

The operating expenses, other than as related to docks at Escanaba, such as maintenance expenses of pooled tracks on the range, mine service tracks and yards, maintenance due to use determined under A. R. E. A. formula, including facilities, locomotives and cars used in handling the ore and transportation expenses, both road and yard, will be pooled and divided upon the same percentages as used in dividing the ore revenue. (R. 160.) Dock operating expense, including depreciation charges and taxes, and all other expenses of maintenance, insurance, taxes, etc. will be divided 30.2 per cent to the Milwaukee and 69.8 per cent to the North Western, which was the ratio of their participation in the total ore tonnage handled over or through the docks by both roads, 1923-1932. (R. 161.) The Marquette Iron Ore Range is a separate and distinct range from the Menominee. The North Western's docks at Escanaba have been used for Marquette ore and Menominee ore, while the Milwaukee's docks have been used only for Menominee ore. (R. 135.) The relation of the tonnage from the Marquette Range to the total tonnage from both ranges during the same ten years was determined, and it was found that the ratio of Milwaukee's Menominee Range tonnage was 30.2 per cent of all tonnage from both ranges. This percentage was adopted as the basis of apportioning compensation for the use of the North Western docks, as well as apportioning certain expenses associated with ownership of docks. (R. 124.)

The rental basis of the contract currently in effect is

six per cent interest on the value of that portion of the road used by Milwaukee. This value was about $900,000, and gives a fixed fair rental of $54,000, of which the Milwaukee pays a wheelage proportion of the fixed amount, but the agreement provides that the Milwaukee's share shall at no time be less than fifty per cent, or $27,000 per annum. (R. 256.) The Milwaukee pays a wheelage proportion of maintenance of way, transportation, general expense, and certain additions and betterments. (R. 254.) So long as the contract remains in force, the Milwaukee will pay the Escanaba and Lake Superior minimum rental of $27,000 and amortized payments of additions and betterments of approximately $1,300 per annum, even though it does not operate over the line of appellant. (R. 254.)

The Milwaukee operated its ore trains over the line of Escanaba and Lake Superior Railroad from Channing to a point in the vicinity of Wells Junction. (Ex. 3.) (R. 350-B.) Under the agreement, it may handle company construction material in or out. It may not do intermediate business between Channing and Wells. It has no scheduled train service. It has no operation at all in the winter time, the operation being confined solely to the ore season. (R. 255.) The Milwaukee has no station or loading point on the Escanaba and Lake Superior Railroad.

The Milwaukee issues tariffs covering iron ore from the Menominee Range to stations in Michigan and Wisconsin. The Escanaba and Lake Superior Railroad is not a participating carrier in the ore movement or in the rates covering the movement of ore from points on the Menominee Range to the docks at Escanaba. (R. 233.)

The North Western tariff on iron ore, to which the Escanaba and Lake Superior is a party, shows the destination as Wells. That is iron ore going to the Delta

Chemical & Iron Company having a furnace located not far north of Wells and served exclusively by Escanaba and Lake Superior Railroad trackage. The rates shown in this tariff, in which the Escanaba and Lake Superior Railroad is a participating carrier, are the rates applicable only on ore which goes to that one industry. They are not shown as a participating carrier in the movement of iron ore from the range to the Escanaba docks. (R. 236.)

If the ore traffic should go off appellants' line, it would revert to the status of an ordinary branch line throughout that country, and there would be about the same traffic on it as on branch lines of the Milwaukee in the same area. (R. 240.) The minimum rental would always take care of the entire maintenance for the line from Wells Junction to Channing. (R. 241.)

The contract, Exhibit 1, which is the basis of the pooling agreement, sometimes called the "Pooling Plan", provides for pooling by North Western and Milwaukee of their earnings on traffic interchanged by each with the Escanaba and Lake Superior Railroad. Paragraph 52 of the contract, Exhibit 1 (R. 338), outlines the method by which the percentages to be used in dividing such earnings are to be determined.

For the six year period, 1927 to 1932, Milwaukee's net revenue on business interchanged with the Escanaba and Lake Superior Railroad was $766,645. The North Western's figure for the same period was $992,290, that is, general commercial business. There was no iron ore traffic in that. (R. 281.) These are the figures referred to in Paragraph 52 of Exhibit 1 (R. 338), and the ratio afforded will be used to divide the pooled revenues received by them from traffic interchanged by the Milwaukee and North Western with the Escanaba and Lake Superior Railroad. (R. 281.)

Exhibit F-16 (R. 422) shows earnings of the Escanaba and Lake Superior on traffic interchanged with the Milwaukee and North Western roads for the Year 1935. (R. 308.)

The Escanaba and Lake Superior operates its own railroad, originates and terminates traffic and interchanges with the Milwaukee and North Western Railroads. Neither railroad is breaking off its connection with the Escanaba and Lake Superior or terminating its interchange relations with them. (R. 128.) The advantage appellant has from ability to interchange with two railroads, it will continue to have, if the pooling arrangement is permitted. (R. 129.) Paragraph 53 was incorporated in the contract (Ex. 1) to save for Milwaukee, business that would be lost to it, if at some future time the North Western acquired the Escanaba and Lake Superior Railroad and there was no longer interchange between that railroad and North Western. In the Commission's plan of consolidation, the Escanaba and Lake Superior was allocated to the Milwaukee. The North Western has no ambitions to acquire the Escanaba and Lake Superior Railroad at the present time. This provision was inserted in the contract to protect the Milwaukee, so that, if at any future time the North Western purchased the Escanaba and Lake Superior, it would not cease to be obligated to pay Milwaukee the percentage of interchange referred to in Paragraph 53. (R. 144.)

Summary of Argument.

1. The contract, Exhibit 1 (R. 316), approved by the Interstate Commerce Commission and the District Court and sought to be set aside in this proceeding, deals with two entirely different classes of traffic and the provisions of the contract with respect to these two classes of traffic are quite unlike.

The first and principal class of traffic dealt with is iron ore traffic from the Menominee Range to the docks at Escanaba. With respect to this traffic, the contract provides not only for pooling of the traffic itself but pooling of the tracks over which the traffic passes, pooling of the locomotives which haul and cars which carry the traffic and pooled use of the docks at Escanaba through which the ore is delivered to boats for transshipment.

The second and minor phase of the contract deals with traffic interchanged by North Western and Milwaukee with the Escanaba and Lake Superior Railroad Company, appellant. This traffic is not pooled, nor is its routing or handling affected in any way or manner. The provision in the contract, Exhibit 1, with respect to division of earnings on this traffic is that the North Western and Milwaukee will divide the aggregate of their future earnings derived from this traffic, according to the ratio afforded by their respective earnings derived from this traffic for the six year period, 1927-1932.

It is agreed that the only question presented for determination is whether appellant is a *carrier involved* within the meaning of Section 5 (1) so that its assent to the arrangements provided for in the contract, Exhibit 1, was required before the Commission might entertain and approve the application presented to it by North Western and Milwaukee.

2. While the question here presented for the court's determination is, in its final analysis one of law, there are important facts of record, material to a sound conclusion on the law, which must be considered. Appellant's relation to the situation must be clearly understood. The Commission has conducted a hearing and made findings of fact with respect to appellant's relation to the issues presented and under repeated decisions of the courts the Commission's findings are conclusive if supported by substantial evidence. These findings are so supported.

3. The appellant is not a "carrier" of ore between the Menominee Range and the docks at Escanaba.

In Section 5 (1) of the Act, the terms "common carrier" and "carrier" appear apparently without any thought of distinction between the two terms.

The Commission made findings with respect to whether appellant is a carrier of ore or of the ore traffic between the Menominee Range and the docks. It found that the appellant never participated as a carrier in the ore traffic in the past. It found that appellant's status is that of a lessor of trackage rights to the Milwaukee. It found that appellant does not participate in this traffic as a carrier. These are findings of fact supported by substantial competent evidence and must be observed as a basis for the determination of the legal question whether appellant is a "carrier involved", with respect to the ore traffic, and whose assent to the contract, Exhibit 1, is required by the statute.

4. Appellant is not a "carrier involved" with respect to that portion or phase of the agreement, wherein the North Western and Milwaukee provide for a division upon an agreed basis of their earnings or divisions from traffic interchanged with appellant.

This traffic is not pooled. So long as the connection between Milwaukee and appellant at Channing remains, all

traffic interchanged by Milwaukee and North Western with appellant will move and be handled exactly as it has been in the past. Milwaukee's and North Western's aggregate earnings derived from traffic so handled will be divided as follows:

The road that handles the traffic will retain 30 per cent of its entire earnings, being its share of the joint rates thereon, and the balance will be divided according to the ratio heretofore stated as having been derived from the six year period.

5. There was no determination by the Commission and no finding by the District Court that the agreement approved by the Commission in its order of November 18, 1936 would necessarily bring about abandonment of any portion of appellant's line.

Throughout appellant's brief, it is assumed and stated that the institution of the Plan, approved by the Commission, will necessarily result in the abandonment of a considerable portion if not the major portion of appellant's line of railroad. There is substantial evidence in the record that such result will not follow if the Commission's findings and the decision of the lower court are sustained. With the elimination of the heavy ore traffic hauled by the Milwaukee over appellant's line, maintenance expenses would be greatly reduced and there is testimony by an experienced witness that the payments appellant will continue to receive under the contract, of $27,000 per year plus amortizations of certain additions and betterments amounting to about $1,300 a year, will take care of entire maintenance of appellant's line from Wells Junction to Channing. The contract by virtue of which Milwaukee has trackage rights over appellant's line has not been abrogated.

ARGUMENT.

The Appellant Is Not a "Carrier" of Ore Between the Menominee Range and the Docks of Escanaba.

In Section 5 (1) the terms "common carrier" and "carrier" appear and apparently without any thought of distinction between the two. A reading of the Section would seem to make it clear that the word "carriers" in the phrase "if assented to by all carriers involved" means carriers or common carriers engaged in the transportation of the property under consideration in any pooling proposition before the Commission. "Carriers involved" is the equivalent of the phrase "carriers engaged". The text "that whenever the Commission is of opinion after hearing upon application of any carrier, or carriers, engaged in the transportation of passengers or property subject to this part, or upon its own initiative" would seem to clearly indicate that only carriers who were engaged in the transportation of the freights proposed to be pooled with division of the revenues therefrom would be "involved" in any orders or authorizations which the Commission might find just and reasonable in the premises under consideration.

Operation by the Milwaukee has been carried on over the line of the appellant since about 1900. This right to so operate over appellant's line was instituted pursuant to a contract identified in the record as Exhibit F-1. This contract expired December 31, 1920, and a new agreement identified as Exhibit F-1-a (R. 393) was entered into between the parties. This second agreement, similar in most respects to the original contract, but providing for substantially increased rentals, runs for a period of thirty years and will expire by its terms on January 1, 1951. These

agreements provide for the movement of iron ore from the Menominee Range by the Milwaukee with its own trains, train crews and equipment over the appellant's line from Channing to a point in the vicinity of Wells Junction, whence the ore trains move through the Milwaukee's yards. There the ore cars are classified and then switched to the Milwaukee's docks. None of the ore has ever been handled by the trains or crews of the appellant company.

Rates covering the movement of the ore are contained in Milwaukee tariffs and the appellant is not now and never has been a participating carrier in the tariff rates covering the movement of iron ore from points on the Menominee Range to the docks at Escanaba.

In the movement of its trains over the appellant's line, the Milwaukee renders no service to any shipping or receiving points on that line. Its rights are limited to the movement of iron ore with its own trains and crews, the movement of materials that the Milwaukee may need in connection with construction of or repairs to its docks or yards at Escanaba and the right to move outbound, occasional loads of coal from coal docks at Escanaba to points beyond Channing. The Milwaukee's crews and trains perform no local common carrier service while on the property of the appellant.

For the right to use the appellant's tracks for the movement of ore, Milwaukee pays such pro rata proportion of $54,000 per year, as Milwaukee's wheelage is to the total wheelage over the tracks used, with the proviso that in no event shall the annual rent for any year be less than $27,000. The Milwaukee also pays a pro rata share of maintenance, operating expenses, taxes, and pays interest on cost of certain additions and betterments applied to the property used.

The Commission found that appellant's status as to the ore moving over its line was that of a lessor of trackage

rights to the Milwaukee and the District Court approved this finding. That finding is supported by substantial competent evidence; in fact, it would seem that no other finding could be sustained on this record.

Payment of rental by the Milwaukee to the appellant is based upon the number of cars that Milwaukee moves over appellant's line. It is not based upon the weight of the contents of the cars. The amounts paid to the appellant by the Milwaukee would in no way be affected by an increase or decrease in the rates provided for in the tariffs for the movement of ore from any of the mines on the range to the docks at Escanaba. While the amount paid the appellant by the Milwaukee for the use of appellant's tracks varied substantially from year to year, it varied only with the rise and fall in the volume of the traffic as compared to the rise and fall of the appellant's traffic.

In appellant's brief, page 5, second paragraph, appears the statement, "the ore traffic is an important source of income to the Escanaba and Lake Superior Railroad" and in the following paragraph appears the statement, "In addition to the ore traffic, the Escanaba and Lake Superior originates and terminates a considerable volume of general traffic".

These expressions are misleading, unless it is kept in mind that the phrase "the ore traffic is an important source of income", can apply only to the rent received by appellant from the Milwaukee for transporting iron ore over appellant's line and that this "income" is not freight charges paid appellant for handling traffic over its line, in its capacity as a common carrier. Furthermore the Escanaba and Lake Superior Railroad, so far as the record shows, does not originate any ore traffic. It terminates some ore traffic which comes down over the North Western line from the Marquette Range and is delivered to appel-

lant by the North Western at Escanaba for delivery to a furnace on appellant's line in the vicinity of Wells.

From the foregoing facts, it is asserted that appellant is not a "carrier" nor is it a "common carrier" in its relation to the ore traffic moved by the Milwaukee from points on the Menominee Range to Escanaba. It has no carrier relation to that traffic. As found by the Commission, the relation between the appellant and the Milwaukee with respect to that traffic is merely that of a lessor of trackage rights to the Milwaukee. In its opinion, the specially constituted District Court in approving this finding of the Commission said, "It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract, the Milwaukee, as lessee of trackage rights, is the sole carrier of this traffic."

In Ballentine's Law Dictionary a "carrier" is defined as a "transporter of passengers or freight." A "common carrier" is defined as "one who undertakes for hire or reward to transport the goods of such, as choose to employ him, from place to place."

> "Common carriers are such by virtue of their occupation and not by virtue of the responsibilities under which they rest." *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 376.
>
> "Who are common carriers is determined by the nature of the business carried on and not by the contract made respecting the liabilities which shall attend it." *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174.

In Century Dictionary Encyclopaedia "pool" is defined (6. (b)) as:

> "a combination of the interest of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public and distribute the profits of the business among themselves equally or according to special agreement. In this sense pooling is a system of reconciling conflicting interests and of obviating ruinous competition by

which the several competing parties or companies throw their revenue into one common fund, which is then divided or redistributed among the members of the pool on a basis of percentages or proportions previously agreed upon or determined by arbitration."

"Pool *v. trans.*—to put into one common fund or stock for the purpose of dividing or redistributing in certain proportions; make into a common fund; as to *pool* interests."

The frequent references in appellant's brief to the effect that its income or revenue will be adversely affected, if the pooling of iron ore traffic from the Menominee Range to the docks at Escanaba is permitted, would tend to give the impression, unless all of the facts surrounding the relationship between the appellant and Milwaukee are kept in mind, that appellant's income so referred to was earned by it as a "carrier" of the ore traffic. Such is not the case. It is true that the appellant's income received from Milwaukee's use of appellant's tracks varies from year to year, but the variation is brought about by the fact that the appellant is a landlord and the Milwaukee its tenant, and the lease provides a sliding scale of rent dependent on the extent of use by the lessee of the leased property.

In writing the lease for the use of its tracks by the Milwaukee, appellant considered variations in rental, due to variations that might occur from a reduced use by the Milwaukee, and fixed the minimum annual rental provision. It is now bound by that provision.

Appellant Is Not a "Carrier Involved" With Respect to That Part of the Agreement Between the North Western and Milwaukee (Exhibit 1), Whereby They Propose to Divide Their Earnings or Divisions on Traffic Interchanged With the Appellant.

This part or phase of the plan, approved by the Commission, is dealt with in Exhibit 1, paragraphs 52, 53, 54 and 55. (R. 338-339.) As repeatedly stated in the record, and as found by the Commission:

> "The Pooling Plan as to traffic other than the ore traffic is intended as an insurance to the Milwaukee of revenue, which is now derived from this traffic and which would be lost in the event of the abandonment of the Western portion of the line of the Escanaba Company, and is merely incidental to the pooling of the ore traffic." (219 I. C. C. 285, 294.)

The revenues derived by appellant on this traffic, which it interchanges with the North Western at Escanaba and the Milwaukee at Channing, will in no way be affected by the proposed pooling of Milwaukee's and North Western's earnings or divisions on such traffic so long as this traffic moves as at present, and the Commission so found. It must be borne in mind that there is no pooling of the traffic itself, no pooling of the facilities used in moving the traffic and there is nothing in this portion of the plan or agreement which in the slightest degree interferes with the routing, the division of earnings allocated to the appellant or the rates on the traffic so interchanged.

The revenues of the appellant earned on such traffic are its own and are derived from its divisions of total revenues on shipments originating and terminating on its own line and delivered to or received from the North Western and the Milwaukee at interchange points. Forwarders and receivers of freight located on the line of the appellant will

in no wise be affected in their privilege of routing traffic forwarded or received by them, nor will the freedom of the appellant to control the routing of such traffic, as originates on its line, in so far as it may have such right, be affected.

The revenues to be pooled on this traffic under paragraphs 52, 53 and 54 of the contract, Exhibit 1, are solely the revenues of the North Western and the Milwaukee and the revenues of the appellant on such interchanged traffic will remain unaffected and unchanged. The appellant now has no interest in the revenues earned by the North Western or by the Milwaukee on traffic which appellant interchanges with those lines. Its interest is limited to its agreed division of the entire revenue derived from any given shipment.

The Milwaukee is not now and never has been a competitor with appellant for traffic originating or terminating on appellant's line.

By virtue of the interchange with appellant at Channing, the Milwaukee is a competitor with the North Western for the handling of business originating or terminating on the line of appellant. The provisions of paragraphs 52-55 inclusive, of the contract Exhibit 1 (R. 338-9), were inserted for the purpose of preserving to the Milwaukee the revenue now derived from this interchange which would be lost in the event the connection at Channing was discontinued and the Commission so found. By paragraph 55 of said contract, the North Western agrees to join with the Milwaukee in establishing appropriate through rates and divisions for handling interline traffic over the North Western via Iron Mountain so as to permit the Milwaukee to continue handling business to and from industries served by the Escanaba and Lake Superior Railroad.

The purpose of paragraph 55 was to furnish the Milwaukee protection against the breaking of the channel through Channing by abandonment of any portion of the

Escanaba and Lake Superior, so that the Milwaukee could still continue to do business with the Escanaba and Lake Superior by virtue of a route via the North Western through Iron Mountain that would permit the Milwaukee to continue to participate in the handling to and from industries served by the Escanaba and Lake Superior Railroad on its line by having traffic, which the latter originated or terminated, routed via the Milwaukee at Iron Mountain instead of as at present, via the Milwaukee at Channing. The Escanaba and Lake Superior should still get about the same division on that business which would be so interchanged with the North Western at Escanaba. (R. 284, 285.)

The record shows that this feature of the plan was created for the purpose of preserving the competition that now exists between the North Western and the Milwaukee on business originating and terminating on the line of appellant. The basis of the division of Milwaukee's and North Western's earnings on such traffic was designed to preserve that competition by allocating to these respective roads 30 per cent of their earnings on such traffic plus their pool proportion of the balance. It was the belief of witnesses for North Western and Milwaukee that this arrangement would make it of advantage to each road to handle all the traffic it could secure in interchange with the appellant and would preserve to the Milwaukee the earnings which it now derives from traffic interchanged with appellant and which, absent this phase of the plan, would be lost to Milwaukee in event the connection at Channing between appellant's line and Milwaukee was discontinued.

The record makes clear that where a given shipment moves over the lines of several railroads on through rates, each carrier participating in the haul receives a certain proportion of the total revenue commonly referred to as its "division". In the handling of interline traffic, each

road's division of the through rate represents its own individual earnings, which are as much its own as if the shipment were one moving wholly between points on its own line. It is thus clear that the pooling by North Western and Milwaukee of their divisions could not in the slightest degree prejudice or affect the divisions of the appellant on such interchanged traffic. These divisions have long been established and will remain unchanged. The flow of such interchanged traffic, the freedom of its routing and the volume will not be affected in the slightest degree by the pooling of North Western's and Milwaukee's earnings therefrom.

We think the Commission correctly found that the appellant was not a "carrier involved" within the meaning and intent of Section 5 (1) of the Act, with respect to the earnings of North Western and Milwaukee on traffic interchanged with appellant.

To give Section 5 (1) the construction contended for by appellant and to hold that appellant is a "carrier involved" as to all class and commodity traffic interchanged between it and the North Western and Milwaukee, because the latter two propose a division of their own revenues derived from such traffic, would, we think, have the practical result of nullifying the statute, for, since as shown, a considerable portion of all interline traffic moves on through rates with established divisions, no pooling arrangement could ever be authorized by the Commission, unless practically all carriers in the United States assented thereto. The record shows (Ex. 21) (R. 366) (Ex. 21-a) (R. 367) that appellant's traffic is quite diversified and that it does generally the business of a common carrier. Exhibit F-16 (R. 422) shows that appellant's divisions on such traffic interchanged with Milwaukee and North Western are quite substantial. In connection with this exhibit appellant's ac-

counting witness testified that the statement represents the earnings of the E. & L. S. from interline traffic moving from the E. & L. S. to the Milwaukee and North Western and over those roads and their connection to distant east and west points. It includes no revenue from iron ore. The figures include all joint traffic of all classes moving from as well as to these two connections except inter-terminal switching. (R. 308.)

If appellant is to be considered a "carrier involved" in the disposition of North Western's and Milwaukee's divisions of earnings on traffic interchanged by them with appellant and moving on through rates, it would seem to follow that all other carriers, participating in such traffic and through rates, would also be "carriers involved". For example, assume that a shipment originates on the line of the appellant, is delivered to and moves via the North Western to Omaha, thence over the Union Pacific to Denver; at the same time a shipment originates on the Union Pacific at Denver, is delivered to and moves via the Milwaukee, Omaha to Channing, where it is interchanged to the appellant for delivery at Wells; on each of these shipments the Milwaukee and the North Western earned a division as would the Union Pacific and the appellant. If the appellant is a "carrier involved" in the pooling of the earnings (*i. e.*, divisions) of the North Western and Milwaukee, earned on said shipments, we see no reason why it must not necessarily follow that the Union Pacific is also a carrier involved since its relation to the two shipments is in principle exactly the same as that of the appellant.

Practically every carrier in the United States is a party to through joint rates with established divisions in effect between substantially all points in the United States on all class and commodity traffic which may move either frequently or only occasionally. A shipment of paper origi-

nating on the line of appellant may move on a joint rate over half a dozen lines to some point in Florida; a shipment of watermelons may originate in Georgia and move on a joint rate over a number of lines, each with its established division for delivery by appellant to a point on its line; likewise with a car of oranges from California to a point on the appellant's line.

A large majority of all movements originating and terminating on appellant's line move over the lines of the North Western and Milwaukee, the two principal lines with which the appellant interchanges traffic and if appellant is "carrier involved" with respect to the disposition of Milwaukee's and North Western's divisions on this traffic, so is every other carrier that participates in the haul and receives a part of the through joint rate as its division. If the appellant's theory be correct, the Commission would be without authority to approve this portion of the Pooling Plan presented to it in the matter now under consideration unless such arrangements have not only the assent of the appellant but the assent of all other carriers who participated in the movements hereinabove described. It seems incredible that Congress should have intended any such requirement in the amendment of the Act of 1920 in Section 5 (1). We assert the logical interpretation is that placed upon it by the Commission in the order sought to be set aside and by the District Court's opinion and decision from which this appeal is taken.

In appellant's brief (pp. 33-34) reference is made to certain ore moving in carloads exchanged by appellant with North Western under joint rates applying thereon. This is ore which originates on the Marquette Range, see Exhibit 2 (R. 350-A), is brought down to Escanaba by the North Western, interchanged with appellant at Escanaba and by appellant delivered to one or more furnace com-

panies located in the vicinity of Wells which are served exclusively by Escanaba and Lake Superior trackage. It is not ore that goes to the docks and the appellant is not a party to any tariff covering or moving ore from any range to the docks at Escanaba. (R. 236.) No one would contend that appellant is not a carrier in every sense of the word with respect to that traffic from the Marquette Range, which terminates on its line, but to say that appellant is a "carrier involved", in what disposition the North Western makes of its division of earnings on said traffic, is placing, we think, a very strained construction on Section 5 (1) of the Act and, as above pointed out, would make it impossible as a practical matter for the Commission to approve any pooling arrangement between two carriers in a given area if they engage in interchanging through traffic with other railroads.

There Has Been No Determination by the Commission or by the District Court That Any Portion of Appellant's Railroad Will Be Abandoned as a Result of the Pooling Arrangement.

On page 19 of appellant's brief, it is stated that the result and effect of the pooling arrangement as approved by the Commission would necessarily be the abandonment of at least a considerable portion of appellant's line. Because of this asserted abandonment, it was argued that appellant's earnings will be affected and it will be relegated to the position of a switching line at Escanaba, with possibly a spur line to some point westerly of Escanaba; that to permit the Pooling Plan to become effective with such dire results would be inequitable and in total disregard of appellant's property rights.

A considerable amount of evidence was introduced at the hearings before the Commission bearing on whether the

Plan presented to the Commission, if approved, would or would not ultimately result in the abandonment of a portion of the line of the Escanaba and Lake Superior Railroad.

There was no finding or determination by the Commission or by the District Court as to whether abandonment of any part of appellant's line would or would not follow if the Plan became effective.

The record makes it entirely clear, however, that any diminution of appellant's income resulting from the Plan would be because of a reduction in the amount paid appellant by Milwaukee for the use of that portion of appellant's line, over which the Milwaukee has trackage rights. The record shows that over a ten year period, 1923-1932 inclusive, the average annual rental paid by Milwaukee to appellant for use of its tracks was $43,274. In addition the Milwaukee paid appellant proportions of maintenance and taxes and certain other expenses on the basis of the extent of the use as between the two companies.

With the elimination of the heavy ore traffic, maintenance expenses on the Escanaba and Lake Superior would be very markedly reduced as would all other expenses affected by movement of Milwaukee ore trains over appellant's line. So long as the trackage rights contract remains in effect, the minimum annual rental payment of $27,000 per year plus approximately $1,300 account amortization of additions and betterments will continue to be paid. Under the proposed Plan, the principal income loss to appellant would be in the reduced amount of rental paid by Milwaukee.

If, as found by the Commission and by the court, appellant does not stand in the relation of a "carrier" or "common carrier" to this traffic, then obviously it has no rights which will have been invaded if the Plan, as ap-

proved, becomes operative. As stated by the specially constituted District Court in its opinion (R. 425):

> "The trackage contract confers only a privilege. It does not obligate the Milwaukee to make any use of plaintiff's track. The pooling arrangement, approved by the Commission, enables the Milwaukee to effect substantial economies, which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff, depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually."

If appellant's relation to the ore traffic moving from the Menominee Range to Escanaba is not that of a carrier or common carrier, it must necessarily follow that appellant is not a "carrier involved", with respect to the pooling of that traffic, within the meaning and intent of Section 5 (1). Such being the case, its consent is not required and no legal right of appellant is invaded by the Pooling Plan. The contract (Ex. 1) does not require that Milwaukee move ore over appellant's line. It merely provides for certain minimum payments whether or not Milwaukee uses the line. As said by the court below:

> "Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The Court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right."

Purpose of Amendment of 1920 to Section 5 (1).

There is no equitable issue presented here for this court's determination. Prior to the Transportation Act 1920, Section 5 (1) made it unlawful for any carrier to enter into a contract, agreement, or combination with any other common carrier for the pooling of freights or division of their earnings. That part of the section beginning with the word "provided" was added by Transportation Act 1920.

On page 21 of appellant's brief appears the heading "The plain purpose of the Act is to prevent unjust and unreasonable pools" and then follows reference to Section 1 (4), Section 3 (3) and Section 15 (4), none of which paragraphs has any relation whatever to pooling freight or division of pooled earnings. This is self-evident from the references made in the several following paragraphs in the portion of appellant's brief referred to; in fact, as appellant states, "Each of these sections is directed against a specific practice and none of them would afford an efficient vehicle of escape from such an unjust situation as that in which the appellant is involved". Following this, it is argued that since these sections evidence a concern on the part of Congress for the individual interests of competing railroads, the provision in Section 5 (1), requiring the consent of carriers involved in pooling arrangements, was also dictated by the concern of Congress for justice and fairness.

This court has frequently considered the effect upon the Interstate Commerce Act of changes which were introduced by amendments contained in Transportation Act 1920. It has been stated frequently by this court that one of the primary purposes of the Transportation Act 1920 was the development and maintenance of an adequate National transportation service.

As has been noted, Section 5 (1), prior to 1920, absolutely prohibited pooling or division of earnings in any form or manner whatsoever and provided heavy penalties for infringement of the Act. The 1920 amendment permitted carriers, with the approval of the Commission, to engage in practices theretofore strictly forbidden. A case in which the purposes of Transportation Act 1920 are discussed at considerable length is the *New England Division case*, 261 U. S. 184.

In that case, opinion by Mr. Justice Brandeis, the court at p. 189 stated:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language.[6] And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range.[7] Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.[8] Upon the Commission, new powers were conferred and new duties were imposed."

Any pooling arrangement or division of earnings authorized by the Commission after hearing, supported by substantial evidence, meeting the provisions of the Section as correctly construed, may not, we submit, be properly termed an unjust or unreasonable pool. If, in approving such plan,

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7. "Among them are the establishment of the Railroad Labor and the Adjustment Boards. Title III, pp. 469-474; see *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board, ante*, 72; the provisions for raising capital, by new Government loans, § 210, pp. 468-9, by loans from the Railroad Contingent Fund (the recapture provision), § 15a (10, 16), pp. 490, 491; those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several states, § 439, pp. 494-496; the provision for consolidation of railways into a limited number of systems, § 407, pp. 480-482; provisions for securing adequate car service; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377; for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier, § 402, pp. 476-478; § 405, p. 479; §§ 412, 413, p. 483.

8. "Section 422, pp. 488, 489. To this end, also, the Commission was empowered among other things, to permit pooling of traffic or earnings, § 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines, § 402, p. 477; *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204; to fix minimum, as well as maximum, rates; and thus prevent cutthroat competition and the taking away of traffic from weaker competitors, § 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; and to determine the division of joint rates."

the Commission had acted outside the scope of its authority, or had erroneously construed the Section, a plan so approved might properly be termed unlawful; but if a pooling arrangement is properly approved by the Commission and complies with the requirements of the Act, and if, in the judgment of the Commission, the terms and conditions of the pooling arrangement are just and reasonable as between the parties thereto, we submit it must be presumed that such approval is in furtherance of the development and maintenance of an adequate system of National transportation, which, as this court has frequently said, was one of the prime purposes of Transportation Act 1920, and it is immaterial in what way or manner such plan or arrangement may affect any carrier who is not a "carrier involved". It should be presumed that the Commission in reaching its conclusion has weighed all the effects, both favorable and unfavorable, that may result. Therefore, if in its judgment, after hearing, the Plan presented to it for approval meets the statutory requirements and if the benefits to transportation that will accrue from the Plan outweigh any disadvantages that may follow its adoption, it is not for the courts to set aside the judgment of the Commission, if it acted within the scope of its authority.

In *Indian Valley Railroad* v. *United States, et al.*, 52 Fed. (2d) 485 (Aff. mem. op. 292 U. S. 608), the court said, at 486:

> "(3) It is not for the courts in reviewing orders of the Commission to weigh the evidence or inquire into the soundness of the reasoning by which the Commission reached its conclusions, or to question the wisdom of the Commission's action, if within the scope of its authority. *Oregon-Washington R. & Nav. Co. et al.* v. *United States, et al.* (D. C.) 47 F. (2d) 250, 251; *The Assigned Car Cases*, 274 U. S. 564, 580, 47 S. Ct. 727, 71 L. Ed. 1204; *Chicago, R. I. & P. R. Co.* v. *United States, et al.*, 274 U. S. 29, 47 S. Ct. 486, 71 L. Ed. 911; *Virginian R. Co.* v. *United States, et al.*, 272 U. S. 658,

665, 47 S. Ct. 222, 71 L. Ed. 463; *The New England Divisions Case, supra; United States, et al.* v. *Erie R. Co.*, 280 U. S. 98, 50 S. Ct. 51, 74 L. Ed. 187."

We submit the report of the Commission and the findings of the District Court, from which this appeal is taken, correctly interpreted the provisions of Section 5 (1).

Conclusion.

Both the Commission and the specially constituted District Court found that in the past appellant never participated as a carrier in the ore traffic from Menominee Range to the docks at Escanaba; that it does not now participate in this traffic as a carrier; and that its status is that of a lessor of trackage rights to the Milwaukee. These are findings of fact within administrative functions of the Commission. There is no contention that these findings are not supported by substantial evidence.

The specially constituted court in conclusion of Law No. 2 stated:

> "The Commission's order of November 18, 1936, is within its authority under section 5 (1) of the Interstate Commerce Act. Plaintiff is not a carrier involved in the pooling arrangement approved by said order."

It is submitted that the Commission and the specially constituted District Court correctly construed Section 5 (1) of the Act and that appellant's assent to the pooling arrangement approved by the Commission is not required; that the judgment appealed from should be affirmed.

Respectfully submitted,

O. W. Dynes,

C. R. Sutherland,

Attorneys for Intervening Defendants,

Appellees.

Dated at Chicago, Illinois, January 29, 1938.

ESCANABA & L. S. R. CO. v. UNITED STATES et al.

(SCANDRETT et al., Interveners).[1]

No. 831.

District Court, W. D. Michigan, N. D.

March 10, 1937.

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1. COMMERCE—95.

The courts may not consider the weight of evidence supporting order of Interstate Commerce Commission or wisdom of order, provided there is evidence to sustain it.

2. COMMERCE—95.

The courts accord to findings of the Interstate Commerce Commission the strength due judgments of a tribunal appointed by law and informed by experience.

3. COMMERCE—88.

Order of Interstate Commerce Commission permitting intervening railroad operating under trackage rights contract over plaintiff railroad's tracks to enter into pooling agreement with another railroad for pooling of iron ore traffic from certain range, and for pooling of their earnings on class and commodity traffic interchanged between them and plaintiff railroad, did not deprive plaintiff railroad of legal rights, notwithstanding intervening railroad would discontinue operations under trackage rights contract (Interstate Commerce Act § 3(3), 49 U.S.C.A. § 3(3)).

4. COMMERCE—85(3).

The Interstate Commerce Commission's certificate that public convenience and necessity permitted abandonment

1. As reported in 21 F. (Supp.) 151 (Advance Sheets Jan. 8, 1938).

by intervening railroad of operations under trackage rights contract over plaintiff railroad's line was within Commission's authority, where abandonment authorized did not relate to usual and ordinary railroad operation, but related principally to transportation of iron ore (Interstate Commerce Act § 1(18-20), 49 U.S.C.A. § 1(18-20)).

5. Carriers—29.

Where railroad carrying iron ore over plaintiff railroad's line under trackage rights contract, carried ore in its own cars with its own locomotives and with its own train crews under bills of lading issued by it under tariffs and rates established by it, plaintiff was not carrier involved in agreement between railroad operating under trackage rights contract and another railroad for pooling of iron ore traffic and of their earnings on class and commodity traffic interchanged between them and plaintiff, and plaintiff's assent to the pooling agreement was not necessary (Interstate Commerce Act § 5(1), 49 U.S.C.A. § 5(1)).

Suit by the Escanaba & Lake Superior Railroad Company against the United States of America, and another, wherein Henry A. Scandrett and others, trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervened.

Order for defendant.

Findings of Fact.

1. Plaintiff is a railroad company incorporated under the laws of Michigan, and is engaged in the interstate transportation of freight and passengers. It owns and operates a line of railway from Escanaba, Mich., where it connects

with the Chicago & North Western Railway and extends in a northwesterly direction for a distance of approximately 63 miles to Channing, Mich., where it connects with the Chicago, Milwaukee, St. Paul & Pacific Railroad. It is a common carrier, subject to the provisions of the Interstate Commerce Act (49 U.S.C.A. § 1 *et seq.*).

2. The defendants are the United States of America and the Interstate Commerce Commission. The trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company were permitted to intervene as defendants.

3. On March 12, 1935, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Chicago & North Western Railway Company, and a nonoperating subsidiary of the latter known as Escanaba, Iron Mountain & Western Railroad Company, filed application with the Interstate Commerce Commission under which they sought an order under paragraph 1 of Section 5 of the Interstate Commerce Act (49 U.S.C.A. § 5(1)), authorizing applicants to pool ore traffic and divide the earnings therefrom, moving from the Menominee Range in Michigan and Wisconsin to the docks at Escanaba, as provided for in an agreement between the three parties, a copy of which was attached to said application. The agreement also provided for the pooling of certain substantial traffic other than iron ore from the Menominee Range, namely, all class and commodity traffic interchanged by the applicants with the plaintiff, as described; the substance of the agreement being as follows: "52. By reason of the arrangement herein proposed, it is assumed that the Milwaukee will cease to obtain some part or all of the revenue it would hereafter enjoy on traffic interchanged by it with the Escanaba and Lake Superior Railroad if this arrangement were not put into effect, and that the North Western will gain some part or all of such revenue if this arrangement is put into effect. It is, therefore,

agreed that from the effective date of this contract the revenues of the two companies from all business interchanged with the Escanaba and Lake Superior shall be pooled on the following basis:"

4. Subsequently, by appropriate petitions and orders, the trustees, appointed by the United States Court at Chicago in proceedings under section 77 B of the Bankruptcy Act (11 U.S.C.A. § 207), of both the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company joined in the aforesaid application.

5. The aforesaid application was denied in a report (*Pooling of Ore Traffic in Wisconsin and Michigan*, 210 I.C.C. 599) and an order was entered September 24, 1935, without prejudice to a renewal if and when the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should procure from the Commission a certificate of convenience and necessity under paragraph (18) of section 1 of the act (49 U.S.C.A. § 1(18)) for the abandonment of certain operations, as contemplated by the aforesaid pooling plan.

6. The Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed with the Commission on November 29, 1935, a contingent application under paragraph (18) of section 1 for a certificate of public convenience and necessity, in substance seeking permission for abandonment of operation, under trackage rights, over the line owned by the Escanaba & Lake Superior Railroad Company between Channing and Escanaba, Mich., and for an order authorizing pooled use and operations of certain tracks and facilities in Michigan and Wisconsin, as more fully set forth in its application, which was docketed as Finance Docket No. 11025. The abandonment request was contingent upon favorable action on the pooling proposition. Thereafter, the aforesaid trustees of the property joined in said application.

7. Plaintiff Escanaba & Lake Superior Railroad Company did not assent to the aforesaid pooling arrangements. It intervened in the aforesaid proceedings, and presented evidence in opposition to both applications. The Escanaba Chamber of Commerce and other organizations and representatives of the communities in the territory affected intervened and offered testimony in opposition to both applications.

8. On November 18, 1936, an order was made and entered by the Interstate Commerce Commission approving and authorizing the pooling by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees, and the Chicago & North Western Railway Company, Charles P. Megan, trustee, and the Escanaba, Iron Mountain & Western Railroad Company (a wholly-owned and controlled subsidiary of the Chicago & North Western Railway) of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of certain class and commodity traffic, and for division of earnings thereon, on terms and conditions set forth in the contract referred to in the Commission's report. On the same date, the Commission made and entered a certificate of public convenience and necessity in a proceeding entitled Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees' Abandonment of Operation, certifying that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights, over the plaintiff's line of railroad between Channing and Escanaba, Mich., in Dickinson, Marquette, and Delta counties, Mich.

9. On December 22, 1936, plaintiff brought this suit to set aside the order and certificate of November 18, 1936. Answer was duly filed by the defendants and intervening defendants, and hearing upon said petition was held at Grand Rapids, Mich., January 22, 1937, before this court constituted of three judges; it having been stipulated that said hearing might be held at Grand Rapids, Mich., in the Southern Division, instead of in the Northern Division. At said hearing there was introduced a certified copy of the evidence introduced before the Commission at the hearings held by it in the aforesaid proceedings; also certified copies of certain other portions of the Commission's record in said proceedings.

10. The record before the Commission and before the court shows that the plaintiff company was incorporated February 12, 1900. The first section of its railway, comprising the southern 31 miles from Escanaba as far as Watson, was constructed previous to 1900, primarily as a logging railroad. The western 32 miles from Watson to Channing was constructed in 1900, primarily for the transportation of iron ore and under a contract of the plaintiff with the Chicago, Milwaukee & St. Paul Railroad Company for a term of 20 years, expiring December 31, 1920. Plaintiff's entire line was made of a much heavier type than would have been necessary for logging engines and trains, and with no grades or sharp curves, for the sake of the iron ore traffic. A new contract was executed between the Milwaukee Road and the plaintiff upon expiration of the original contract and will expire January 1, 1951. The agreement of 1900 was made at a time when the Milwaukee Railroad foresaw and was providing for a large increase in the iron ore traffic from the Menominee Range. It had previously handled that traffic by a route southbound over its main line through Channing down to Pembine, Wis.,

thence over the Soo Line to the latter carrier's docks at Gladstone, Mich.

11. Since the year 1900, the Milwaukee Railroad has run its ore trains from Menominee Range via Channing over the line of railway owned and maintained by plaintiff and to docks at Escanaba owned by the Milwaukee Road, for transshipment via lake vessels. The tariffs of freight rates under which this ore has moved are tariffs of the Milwaukee Railroad. The engines and cars are owned and the train crews are employed by the Milwaukee Road. The plaintiff is lessor of the tracks from Channing to Escanaba, it maintains the tracks, under a high standard of maintenance, and it dispatches the movements of the ore trains.

12. The Chicago & North Western Railway also has been a very large carrier of iron ore for many years past from the Menominee Range to Escanaba which moves over its line of railroad to Iron Mountain, Mich., and thence eastward over a line owned by Escanaba, Iron Mountain & Western Railroad, which is a wholly-owned nonoperating subsidiary of the North Western, to ore docks owned and operated by the North Western at Escanaba.

13. The ore docks of the Milwaukee Road at Escanaba became seriously out of repair in 1932, and since that time that road has been making use of the North Western ore docks. Thereupon, the officials of the two roads made a private study, which was completed in 1932, of the feasibility of a plan of pooling the ore traffic. This resulted in the execution of the pooling agreement aforesaid, and the application to the Commission.

14. The plaintiff also interchanges with each of the applicant railroads a large volume of general traffic which moves over through routes and under joint rates of the plaintiff with each such applicant. The agreement between the applicants, as approved by the Commission, provides

for the pooling of all earnings of this joint traffic. There is no pooling of the traffic itself or of the facilities used in moving the traffic. There is nothing in this portion of the pooling plan which interferes with the interchange, routing, or division of earnings allocated to plaintiff, or with the rates on the traffic so interchanged. By the application to the respective roads of 30 per cent of their earnings on such traffic, it is to the advantage of each road to handle all the traffic it can secure in interchange with plaintiff, and competition between the Milwaukee Railroad and the North Western Railway on traffic originating and terminating on the line of plaintiff is thereby preserved.

Conclusions of Law.

1. The Commission's findings and conclusions, as set forth in in its reports of September 24, 1935, and November 18, 1936, are supported by substantial evidence.

2. The Commission's order of November 18, 1936, is within its authority, under section 5(1) of the Interstate Commerce Act (49 U.S.C.A. § 5(1)). Plaintiff is not a carrier involved in the pooling arrangement approved by said order. The carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement. None of plaintiff's traffic and none of its earnings are to be pooled, and it is not a party to the pooling agreement. Therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under section 5(1) of the act.

3. There is nothing before the court to indicate that the pooling of earnings as between the Milwaukee and the North Western on class and commodity traffic will result in violations of section 3(3) of the Interstate Commerce Act (49

U.S.C.A. § 3(3)) to the injury of plaintiff. Nor is there anything before the court to indicate that complaint of such alleged violations has been submitted to or passed upon by the Commission either in the aforesaid proceedings or otherwise.

4. The Commission's certificate that public convenience and necessity permit the abandonment by the Milwaukee of operation under trackage rights over plaintiff's line between Channing and Escanaba is within its authority under section 1 (18), (19), and (20), of the Interstate Commerce Act (49 U.S.C.A. § 1 (18-20)).

5. Said certificate and said order approving the pooling arrangement were made after full hearing, and are fully supported by the evidence. In making them, the Commission committed no error of law, and both are valid.

6. An order will be entered denying the prayer of the petition filed herein.

* 2 * * * * *

Before SIMONS, *Circuit Judge*, and MOINET and RAYMOND, *District Judges*.

RAYMOND, *District Judge*. Plaintiff seeks, under the authority of 28 U.S.C.A. §§ 41 (28), 45 46 and 47 (28 U.S.C.A. §§ 41 (28), 45, 46, 47), to enjoin an order and certificate of the Interstate Commerce Commission entered November 18, 1936. The Commission's report issued therewith is found in *Pooling of Ore Traffic in Wisconsin and Michigan*, 219 I.C.C. 285. That report and the findings of fact accompanying this opinion sufficiently state the relationship of the parties and the course of the litigation. Upon oral argument, counsel agreed that the issues here for consideration are greatly restricted by the provisions of the Transportation Act of

2. Appearances omitted.

1920 (41 Stat. 456), which introduced into federal legislation a new railroad policy and vested the Commission with extensive powers and discretion beyond the scope of review by the courts. See *New England Divisions Case,* 261 U.S. 184, 189, 43 S.Ct. 270, 273, 67 L.Ed. 605; *Texas & Pacific Railway Co.* v. *Gulf, etc., Railway Co.,* 270 U.S. 266, 277, 46 S.Ct. 263, 266, 70 L.Ed. 578; and *Colorado* v. *United States,* 271 U.S. 153, 162, 163, 46 S.Ct. 452, 453, 454, 70 L.Ed. 878.

In general, the order and certificate complained of authorize the pooling of iron ore traffic from the Menominee Range to the docks at Escanaba, Mich., the pooling of the revenues therefrom, the expenses thereof, and of the tracks, equipment, facilities, and employees engaged in that traffic between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago & North Western Railway Company; the pooling by these two railroads of their earnings on class and commodity traffic interchanged between them and the plaintiff at Channing and Escanaba; and the abandonment by the Milwaukee Road of its operations under trackage rights for transportation of iron ore over the line of plaintiff's railway from Channing, Mich., to Escanaba.

Plaintiff urges that the record contains no substantial testimony tending to prove that competition will not be unduly restrained by the pooling of traffic in iron ore; that there is no evidence to support findings sustaining the pooling of class or commodity traffic; that there is no substantial evidence warranting the Commission's finding that public convenience and necessity permit abandonment of the operation by the Milwaukee Road of plaintiff's railway line from Channing to Escanaba under the agreement for trackage rights and argues that the overwhelming preponderance of the evidence is that the direct probable results of

such abandonment will be serious injury and detriment to the public. Plaintiff also insists that the Commission's jurisdiction to authorize the pooling of freight by railroad is expressly limited by the requirement of paragraph 1 of section 5 of the act (49 U.S.C.A. § 5(1)), that division of traffic or earnings shall be assented to by all the carriers involved; that it is a carrier involved; and that its assent has not been given.

[1, 2] The binding effect of fact findings by the Commission and the limitations upon the power of the courts to disturb them have been so frequently noted that restatement is not required. See *Pittsburgh & W. V. Railway Co.* v. *United States* (D.C.) 41 F. (2d) 806, 808. It is clear that courts may not consider the weight of the evidence or the wisdom of the order made, provided there is evidence to sustain it. The courts accord to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." See *Illinois Central Railroad Co. et al.* v. *Interstate Commerce Commission,* 206 U.S. 441, 27 S.Ct. 700, 704, 51 L.Ed. 1128. In the instant case, the Commission found that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the pooling agreement; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable. Examination of the record is convincing that there is substantial evidence to support these findings. It is true that the applicants did not upon some issues produce all of the available evidence; that some of the evidence was of the kind commonly designated as opinion or expert evidence, given by employees of some of the

interested parties; and that other evidence was indirect or circumstantial. But these considerations do not warrant its rejection in determining whether or not there was more than a mere scintilla of evidence before the Commission. Such evidence is commonly accepted as convincing, even in criminal trials. Against the admitted loss and inconvenience to the communities along the line of plaintiff's railroad, the Commission was charged with the responsibility of weighing the loss and inconvenience to the larger general public; national in scope. Under repeated decisions, we have no right to weigh this evidence to determine whether our conclusions thereon would differ from those of the Commission.

[3, 4] It it important to observe that the abandonment authorized by the Commission does not relate to usual and ordinary railroad operations. It is limited to the discontinuance of operations by the Milwaukee Railroad under a contract for trackage rights relating principally to the transportation of iron ore. Continuance by plaintiff of operation by the railroad is in no way limited. The trackage contract confers only a privilege. It does not obligate the Milwaukee to make any use of plaintiff's track. The pooling arrangement approved by the Commission enables the Milwaukee to effect substantial economies which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually. Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right.

[5] Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the interchange of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract the Milwaukee, as lessee of trackage rights, is the sole carrier of this traffic. Other traffic interchanged at Channing with the Milwaukee is not disturbed by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the conseqnences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway.

The conclusion of the court is that the certificate and order complained of find adequate support in the record, and that the prayer of the petition filed herein should be denied. An order will be entered accordingly.

No. 26903[1]

Pooling of Ore Traffic in Wisconsin and Michigan

In the Matter of Application of Chicago & North Western Railway Company, Escanaba, Iron Mountain & Western Railroad Company, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company for Authority to Pool Ore Traffic from Menominee Range to Docks at Escanaba, Mich., and to Divide Earnings Therefrom

Submitted September 26, 1936. Decided November 18, 1936

1. Proposed contract between the Chicago & North Western Railway Company, the Escanaba, Iron Mountain & Western Railroad Company, and the trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, providing for the pooling of interstate ore traffic from the Menominee Range in Michigan and Wisconsin to Escanaba, Mich., and of class and commodity traffic to and from points on the line of the Escanaba & Lake Superior Railroad Company, and the division of earnings therefrom, approved. Prior report, 210 I. C. C. 599.

2. Certificate issued permitting abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, of operation under trackage rights over the Escanaba & Lake Superior Railroad Company's line of railroad in Dickinson, Marquette, and Delta Counties, Mich.

Appearances as in 210 I. C. C. 599; also *Arthur J. Lovell*, for interveners.

[1] This report also embraces Finance Docket No. 11025, Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment of Operation.

REPORT OF THE COMMISSION ON FURTHER HEARING

DIVISION 4, COMMISSIONERS MEYER, PORTER, AND MAHAFFIE

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by the Escanaba and Lake Superior Railroad Company and the issues were orally argued.

In the original report in no. 26903, 210 I. C. C. 599, division 6 considered an application for approval of a contract between the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter termed the North Western and the Milwaukee respectively, providing for the pooling of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, hereinafter termed the Escanaba Company, and for the division of earnings therefrom. The application was denied without prejudice to the filing of another application under section 5 (1) of the Interstate Commerce Act after a certificate of convenience and necessity had been obtained permitting the abandonment of operation involved or the filing of an application under section 5 (1) at the time of filing the application for such a certificate. The Milwaukee transports the ore traffic over the line of the Escanaba Company between Channing, Mich., and Escanaba, under a trackage-right contract which does not expire until January 1, 1951. The abandonment by the Milwaukee of the use of the Escanaba Company's tracks is incidental to the operation of the pooling plan.

Accordingly, application was filed on November 29, 1935, for a certificate of public convenience and necessity permitting the abandonment by the Milwaukee of this operation

between Channing and Escanaba, 63.5 miles, and for an order authorizing a pooled use and operation of certain tracks and facilities in Iron, Dickinson, Menominee, and Delta Counties, Mich., and Florence County, Wis. This application is recorded in Finance Docket No. 11025 and was heard with the application in no. 26903, which was reopened for further hearing.

Since January 1, 1936, the Milwaukee has been in the custody of trustees appointed in reorganization proceedings under section 77 of the Bankruptcy Act, as amended. Subsequent to the filing of the application in Finance Docket No. 11025, a supplemental application was filed reciting appointment of Henry A. Scandrett, Walter J. Cummings, and George I. Haight, as trustees of the Milwaukee, and requesting that they be made parties applicant in the proceeding. Also the trustees of the Milwaukee filed a motion immediately preceding the further hearing in no. 26903 requesting that they be joined as parties applicant in that proceeding. The North Western was not represented at the further hearing, which related principally to the abandonment under consideration. Later, Charles P. Megan, trustee for the North Western also filed a motion requesting substitution as a party applicant. The North Western has been in trusteeship since June 28, 1935. No objection was made to these motions. These trustees have been made parties to these proceedings.

The Escanaba Company intervened in opposition to the proposed abandonment of operation, and the proposal is opposed also by the cities of Escanaba and Iron Mountain, Mich., the chambers of commerce of those communities, the village of Channing, the supervisors of Delta County, representatives of the carriers' employees, and residents of the territory tributary to the line of Escanaba Company.

The first contract granting the Milwaukee trackage rights

over the rails of the Escanaba Company for 20 years was made in 1900. At that time the line was a logging road extending about 31 miles from Escanaba to Watson, Mich. A condition contained in that contract required the extension of the Escanaba's rails from Watson to Channing. This condition, which was later fulfilled, consummated the contract. Before the expiration of the first contract the present one was executed covering the period from January 1, 1921, to January 1, 1951.

It appears desirable that certain of the basic facts recited in the original report be repeated. The Milwaukee has a line running north from Iron Mountain to Channing, 24.1 miles, thence West to Kelso Junction, Mich., 7.8 miles, thence northwest to Amasa, Mich., 12.4 miles, and beyond to Ontonagon, Mich. Regular freight and passenger service to and from Channing is maintained over those lines. It also has a line running northeast from Iron River, Mich., to Channing. All ore now handled by it from the Menominee Range is concentrated in its own yards at Channing, whence it is moved by its own power and crews, under trackage right over the rails of the Escanaba Company to Escanaba where it is delivered to the docks, which will presently be described. The Milwaukee also has the right under the contract to use the line of the Escanaba Company running southeasterly from Wells Junction through Wells in the immediate vicinity of Escanaba. Ore trains of the Milwaukee move to a point just south of Wells Junction where they enter the yard of the Milwaukee. The Milwaukee is also privileged under the contract to handle certain coal outbound from its docks located immediately north of its ore docks; and also it may handle company construction material between Channing and its docks at Escanaba. It does not operate any scheduled service and has no station at any point on the line of the Escanaba Company.

The Milwaukee owns two ore docks at Escanaba, known

as docks 1 and 2, which were built in 1901 and 1902 respectively, and which have not been reconstructed. In 1934 it used its dock 2. This it was able to do by making temporary repairs costing approximately $30,000 and because the traffic that year was very light. But the Milwaukee's docks since that time have deteriorated to such an extent that they have not been usable. In the last year it has been using the North Western's docks on the same terms agreed to in the proposed pooling contract. At the time of the further hearing the ore season had not opened for the year 1936. Under the proposed plan the Milwaukee would be accorded the use of the North Western's dock at Escanaba for the handling of ore from the Menominee Range.

The proposed contract provides that the Milwaukee shall handle, with its road trains and crews, ore from the mines in the vicinity of Amasa, in the Menominee Range, over its own line to Iron Mountain, where the ore would be delivered to the North Western. All other ore from the Menominee Range would be handled by the road trains and crews of the North Western from production points to Escanaba over its own rails. From Iron Mountain to Escanaba the loaded ore cars would move over the line of the Escanaba, Iron Mountain and Western Railroad Company, a subsidiary of the North Western, and the empty cars would move back from Escanaba to Iron Mountain over the line of the North Western. This arrangement would virtually furnish a double-track movement, although slightly longer than the present route, as these lines nearly parallel each other between the points indicated. The details of this proposed operation are contained in the contract.

Most of the mines in the Crystal Falls and Iron River districts, within the Menominee Range, are served by both the Milwaukee and North Western over jointly owned mine tracks. A few of the mines are served by tracks owned by

either one or the other of those companies. At some mines the Milwaukee performs all the switching for both roads, and at others the North Western performs all of the switching. Under the present arrangement it is the practice of the ore shippers in this producing area to divide their tonnage between the two lines. When shipment over one line is temporarily discontinued and begun over the other line the carrier that has been hauling the ore moves its switch engines and equipment, making way for the operations of the other carrier. Under the proposed plan the shifting of switch engines and equipment by the respective carriers as described would be discontinued.

The ore is of varying grades and the prevailing practice is to mix ore at the docks in order to obtain a definite chemical combination or grade for each cargo. Each car of ore is sampled at the mine as it is loaded, and the disposition of it thereafter is controlled by the results of the sample and the use that can be made of it in building up the definite cargo content desired. When the Milwaukee used its own docks, it maintained a switch engine at its yards for breaking up ore trains, placing loads on the dock for unloading, and removing and assembling the empties for trains returning to Channing. In 1932, 1933, and 1935, when the Milwaukee used the North Western's dock, the latter performed the switching at the dock and its engines went into the Milwaukee's yards, classified the ore, and moved it to the North Western's dock after the cars were ordered by the dock agent. It is more economical to switch ore from the North Western's yards than from the Milwaukee's yards to the dock of the North Western.

All revenues from ore traffic from the Menominee Range transshipped through the dock of the North Western at Escanaba would be apportioned upon the division of the business obtaining during the 10-year period 1923 to 1932 which was 34 percent to the Milwaukee and 66 percent to

the North Western. The expenses directly connected with the movement of the ore would be divided upon the same percentages as the revenues. Locomotives and cars for the movement would likewise be furnished upon the same percentages. Savings as determinable in advance of pooling, and mainly as derived from discontinuance of the use of the facilities of one of the carriers would be divided approximately equally between the two parties. Other savings resulting from consolidation of operations over a single line, and through one set of facilities, would be divided between the two parties approximately upon the division of revenues and the direct operating expenses. It appears that some of the savings could be calculated definitely, while others could only be approximated.

In 1935 the first ore was handled on April 23 and the last on November 18. Between the dates indicated, 210 days, the Milwaukee handled 79 trains over the line of the Escanaba Company. The average tonnage for the 79 trains was 8,872 tons, including also the weight of the equipment. The average annual shipments of ore from the Menominee Range during the 10-year period 1923 to 1932 were 4,074,869 tons, of which 1,391,443 tons, or 34 percent, moved by the Milwaukee and the remainder, 2,683,426 tons, by the North Western. During the same period all of the ore over the Milwaukee was handled through the docks at Escanaba and 3,191,934 tons, part of which came from the Marquette Range, moved by the North Western to Escanaba and was handled through the docks at that point. In 1935, 1,633,879 tons of ore moved from the Menominee Range, of which 28.5 percent or 465,602 tons moved by the Milwaukee and 1,168,277 tons moved by the North Western. In that year a total of 1,823,655 tons of iron ore moved to the docks at Escanaba. The movement in 1935 from the Menominee Range over the Milwaukee was about 165,000 tons less than in 1934 and about 38,000 less than in 1933.

Under the present contract the Milwaukee is obliged to pay to the Escanaba Company $27,000 per annum as a fixed minimum rental until January 1, 1951, and in addition thereto amounts on a tonnage, or so-called wheelage basis, including a *pro rata* share of the operation expenses, taxes, and additions and betterments. The average annual payment of the Milwaukee to the Escanaba Company on account of the trackage rights on the ore traffic during the 10-year period from 1923 to 1932 was $181,226, and for the 5-year period from 1931 to 1935, $79,555. The detailed items included in these payments are maintenance of way and structures, transportation other than train, taxes, amortization and interest on additions, current betterments, and such amounts of rental as the *pro rata* proportion of the use of the line of the Escanaba Company bore to the number of miles run by the cars and engines of both companies operating over the tracks of the Escanaba Company, during each year, subject to a minimum rental of $27,000.

If the Milwaukee were to continue handling ore to docks, it would be necessary to rebuild its no. 1 dock at an estimated cost of $1,000,000. Under present financial conditions, the Milwaukee would have difficulty in obtaining the funds for that purpose, and were it possible so to do, the wisdom of such an investment might be questionable in view of the prospective ore tonnage. The new dock would cost the Milwaukee annually about $110,000 for interest, depreciation, maintenance, taxes, and fire insurance and protection. The average annual cost to the Milwaukee in similar items for use of the North Western's dock under the terms of the contract is estimated at approximately $46,000. One of the North Western's docks has an estimated remaining life of 15 years.

Approval of the proposed plan would allow the Milwaukee to salvage its ore yards and its tracks to the docks at Escanaba, which would result in a saving of $4,225 per

year, and under the terms of the pooling contract it is estimated that one-half or $2,112 would represent the amount saved by the Milwaukee. Based upon the 10-year period prior to 1932, the Milwaukee would save in maintenance of way and structures not due to use, approximately $41,950 in connection with the line-haul service from the range to the dock. To these figures, when adding the amount of rental over the minimum until 1951, taxes and general expenses, estimated savings annually of $76,845, of which 50 percent, or $38,423, could be assigned to the savings to the Milwaukee under the terms of the proposed pooling contract. Under that contract there would also be eliminated maintenance not due to use in connection with the tracks and yards on the range, $5,000; interest on so-called salvage, $800; and taxes of $200; or a total saving of $6,000, of which 50 percent, or $3,000, would accrue to the Milwaukee. These savings to the Milwaukee, so long as the present North Western dock is in use, would total $109,675 per annum. Other savings under the proposed plan can not be reduced to figures but would be accomplished by joint handling of the ore tonnage through the docks, from joint or consolidated switching on the range or at intermediate points, and of train service between the range and the docks. There would also be substantial savings to the Milwaukee in the reduction in the number of ore cars required.

The Milwaukee's operating revenues declined from $142,569,632 in 1930 to $84,900,833 in 1932, but since that year have risen to $87,859,792 in 1934 and $92,473,793 in 1935. In this period the system sustained net losses aggregating almost $90,000,000.

One provision of the contract as to pooling of traffic provides that the revenues of the Milwaukee and the North Western on traffic interchanged with the Escanaba Company shall be pooled. Under this proposed arrangement a study of the 6-year period 1927 to 1932 is to be made, and

the total revenue accruing to each company on business interchanged by the Milwaukee and the North Western with the Escanaba Company is to be determined. From the total business amount interchanged by the Milwaukee with the Escanaba Company an amount equal to 10 percent is to be deducted. The relation between the remainder and the total of such remainder, plus the revenue of the North Western, is then to be determined. Thereafter, the total revenues derived by each company from traffic interchanged with the Escanaba Company, less an amount of 30 percent of such gross revenues to cover cost of handling by either company, is to be put into a pool and divided on the basis of the percentages established for the 6-year period. For the 6-year period 1927 to 1932, the total net revenue on traffic to and from points on the line of the Escanaba Company accruing to the Milwaukee was $766,645 and to the North Western $992,290.

Under another provision of the contract the North Western agrees to join with the Milwaukee in establishing appropriate joint rates and divisions for handling interline traffic via Iron Mountain, so as to permit the Milwaukee to continue handling traffic to and from industries served by the Escanaba Company, either direct or through reciprocal switching arrangements with the North Western. All such traffic interchanged at Iron Mountain would be included in the foregoing pool the same as traffic interchanged at Channing. The provision in the contract regarding the establishment of joint rates between the Milwaukee and the North Western on traffic interchanged with the Escanaba Company would seem to contemplate that at some later time the Escanaba Company might be abandoned west of Groos or west of Northland, thus discontinuing the only connection, at Channing, with the Milwaukee. This subject will be discussed in connection with the opposition presented by the Escanaba Company.

The line of the Escanaba Company connects with the line of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company at North Escanaba but the latter line is principally an east-and-west railroad and any route by that line to Chicago, Ill., or lower Wisconsin destinations would be circuitous and not ordinarily used. Discontinuance of service by the Escanaba Company on the part of its line into Channing would necessarily destroy the competitive nature of this class and commodity traffic interchanged with the Escanaba Company. Under the proposed contract this traffic may be hauled by either the Milwaukee or the North Western and it is provided that joint rates will be established between these two lines through Iron Mountain. Only the revenue is to be pooled. In 1935 the revenue on interline traffic interchanged with the Milwaukee at Channing was $69,884 and that interchanged with the North Western at Escanaba was $68,706. Such revenues would not be affected, so long as the Escanaba Company continues its present plan of operation.

The Escanaba Company contends also that the Milwaukee's application for permission to abandon operation is conditional, and that the North Western has not complied with the provisions of section 1 (18) by seeking permission to abandon its Amasa branch, which would be necessary to make effective the proposed plan. The Milwaukee's application is definite and certain. It seeks the abandonment under consideration only if the pooling arrangement be approved. The North Western has not tested the merits under section 1 (18) of abandoning its Amasa branch, but intends to file an application at the appropriate time for permission to abandon that branch.

The Escanaba Company fears that the abandonment of the use of its line for ore trains would jeopardize its revenues to such an extent as to lead to the abandonment of its line except possibly a small section thereof east of Groos.

It has 18 stations which are the following distances in miles from Wells: Escanaba 4, Groos 2, Lamber 5.5, Chandler 9.5, Salva 12, Cornell 13.5, Woodlawn 18, Hendricks Tank 21, Hendricks 22, Mashek 29.5, Reade 33.5, Northland 36, Alfred 38.5, Savards 41.5, Ralph 46.5, Turner 52.5, Golden 59, and Channing 63.5. The territory adjoining the tracks of the Escanaba Company was once heavily timbered. Most of the heavy timber has been cut out, the territory has been settled by farmers to some extent, and small communities have sprung up near some of the stations. Ralph, Northland, and Watson each have about 75 to 80 people. The farmers supplement their earnings by cutting small timber. The territory adjoining the tracks of the Escanaba Company is sparsely settled and the growth of agriculture has been slow. In 1935 the 18 intermediate stations on that line originated 46 carloads of potatoes, 5 carloads of sugar beets, 1 carload of hay and grain, and 1 carload of machinery, or a total of 53 carloads, or 974 tons. The forest products that year amounted to 544 carloads. From 1931 to 1935 the Escanaba Company hauled 2,112,580 tons (62,229 carloads) of carload freight, and 13,914 tons of less-than-carload freight, or a total of 2,126,494 tons. By years, in order, the total freight hauled amounted to 463,664, 325,265, 339,997, 473,706, and 523,862 tons, and 13,383, 9,584, 11,333, 13,383, and 14,758 carloads. According to commodities the carloads were divided as follows: Forest products 32,042, manufactures and miscellaneous 16,634, coal 9,213, ore 1,350, other products of mines 1,465, products of agriculture 981, and animals and animal products 544. Forest products comprised 51 percent of the total. This movement by years, in order, was 7,590, 3,964, 5,502, 7,249, and 7,737 carloads. Freight originating at stations between Groos and Channing amounted to 1,424 cars in 1934 and 1,696 cars in 1935, or a total of 3,120, of

which 2,133 moved to local points and 987 to off-line destinations. All but 102 carloads were forest products.

The Escanaba Company fears that as the timber tributary to its line becomes exhausted, the remaining traffic available will be insufficient to yield revenues to support the cost of operation. Practically all the virgin timber has been cut, and while one large company has approximately 6,000,000 feet available for shipment, half of this is to be cut by settlers instead of by the owner.

In 1923 this carrier sustained a net loss of $25,048, but earned net income in each of the succeeding 12 years 1924-35. These net earnings ranged from $14,180 to $138,447 and aggregated $965,739, or over $80,000 per year. In each of the years 1933-35, in order, its net income amounted to $69,703, $72,866, and $69,218. During the years 1923-33 the intervener paid dividends aggregating 115 percent and paid off all its funded debt. Dividends of 10 percent were paid in 1934 and 1935.

The Escanaba Company has undertaken by exhibits to adjust its income statements for 1934 and 1935 to indicate the effect of abandonment of operation by the Milwaukee over its line. These adjustments include in operating expenses proportions paid by the Milwaukee, and exclude from nonoperating income all sums received from the Milwaukee as joint-facility rents. On this basis it is calculated that, without the support received from the Milwaukee for use of its line under the trackage agreement in the years 1931-35, the Escanaba Company would have sustained losses amounting to $61,893, $36,220, $5,548, $9,448, and $5,653, respectively. These calculations do not take into consideration the payments which the Milwaukee would have continued to make under the agreement had the proposed abandonment of operation occurred at the end of 1930, or the possible savings in the expense of maintenance

had the Milwaukee's ore trains ceased to operate over the line subsequent to that year.

A witness for the Milwaukee experienced in the study of the earning capacity of system branch lines expressed the opinion that the Escanaba Company can continue operation for years by virtue of economies in maintenance expenditures and reduced train service, and that, if and when further relief were needed, the portion of its line from Channing to Northland, 27.5 miles, might first be abandoned and the remainder operated, on a self-sustaining basis, as a branch from Northland to Escanaba and Wells.

On behalf of employees of the Milwaukee and the Escanaba Company it is argued that to approve the proposed plan would result in loss of employment and loss of investment in homes, and that before the plan is approved the Milwaukee should agree to indemnify employees against such losses. We have heretofore said that in abandonment proceedings under section 1 (18) we are without power to attach any conditions except as required by public convenience and necessity. *Chicago G. W. R. Co. Trackage,* 207 I. C. C. 315.

Protests of individuals, communities, and commercial organizations are founded on the assumption that service by the Escanaba Company will terminate eventually, if not in the near future, under the proposal of the Milwaukee. Testimony adduced on their behalf is directed to the need for such service and the injury such an abandonment would impose upon the public contrasted with the benefits which would flow to the Milwaukee. Many witnesses residing in villages or communities along the line of the Escanaba Company testified that abandonment of their only railroad service would impair their life's savings invested in homes, deprive them of a means of marketing their crops, and possibly compel them to move and start over again. Escanaba

has a population of 14,524 persons and the population along the line of the Escanaba Company is 6,303. Persons along the eastern 40 miles of the Escanaba Company trade at Escanaba. In 1930, $8,665,000 worth of retail business was transacted by Escanaba merchants. Traffic moving to and from Escanaba, Wells, and Groos is competitive. The service between Escanaba and Chicago via Channing has been placed upon a basis competitive with that of the North Western.

The pooling plan as to traffic other than the ore traffic is intended as an insurance to the Milwaukee of revenue which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of the line of the Escanaba Company, and is merely incidental to the pooling of the ore traffic. There is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the public, that costs of operation will be reduced, or that competition will be unduly restrained. However, according to the record, the earnings of the Escanaba Company on this traffic and services to the public would in no way be affected by the proposed division of earnings by applicants so long as traffic originating at, or destined to, points on the Escanaba is handled as at present.

In the operation of ore trains via Channing, the line of the Escanaba Company is now only an intermediate link between the Milwaukee and the North Western, and the latter carrier operates only as a switching line. The original use of the line of the Escanaba Company for the transportation of ore traffic contemplated the use of the Milwaukee docks. Abandonment of the Milwaukee docks and some restraint of competition as a consequence, is already a reality and it appears that the amount of ore traffic that is likely to move does not warrant the maintenance of ore docks by both the North Western and the Milwaukee. The

Milwaukee and the North Western cannot be required to continue the service embracing the line of the Escanaba Company merely because of the undesirable effect of the discontinuance thereof upon the revenue of that company.

Section 5 (1) is specific in setting out jurisdictional findings of fact which are prerequisite to our approval of a pooling agreement. One of these is that the agreement must be "assented to by all the carriers involved." The Escanaba Company contends that it is a carrier involved within the meaning of the act, and since it has not assented to the pooling agreement, we do not have jurisdiction to approve and authorize the agreement. It is therefore necessary to determine whether the Escanaba Company is a carrier involved within the meaning of the act. As pointed out in the original report, the Escanaba Company never participated as a carrier in the ore traffic in the past. Its status was that of a lessor of trackage rights to the Milwaukee. It does not now participate in this traffic as a carrier. Under these circumstances, it cannot be considered a carrier involved in the pooling agreements now before us. It necessarily follows here that the carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanada Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard.

We find that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the contract; and that the terms and conditions under which such divi-

sion of traffic and earnings is proposed to be effected are just and reasonable.

We further find that the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation under trackage rights over the line of the Escanaba and Lake Superior Railroad Company in Dickinson, Marquette, and Delta Counties, Mich., described in the application recorded in Finance Docket No. 11025.

An appropriate order and certificate will be issued effective as to the abandonment of operation from and after 30 days from the date thereof. Suitable provision will be made therein for the cancellation of tariffs.

ORDER.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of November, A. D. 1936.

No. 26903

In the matter of the application of Chicago and North Western Railway Company; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for authority to pool ore traffic from the Menominee Range to docks at Escanaba, Mich., and to divide the earnings therefrom

It appearing, That the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees, filed a joint application under Section 5 (1) of the

Interstate Commerce Act for approval of a contract providing for the pooling of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract;

IT FURTHER APPEARING, That on September 24, 1935, division 6 upon full investigation of the matters and things involved made and filed its report and order in the above-entitled proceeding and subsequently upon appropriate petition reopened the said proceeding for further hearing in connection with Finance Docket No. 11025, Chicago, Milwaukee, St. Paul and Pacific Railroad Company Trustees Abandonment of Operation;

AND IT FURTHER APPEARING, That there has been a full hearing of the matters and things involved in the said proceeding and that the division, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon, which said report and report on further hearing are hereby referred to and made a part hereof:

IT IS ORDERED, That the pooling by the Chicago and North Western Railway Company, Charles P. Megan, trustee; Escanaba, Iron Mountain and Western Railroad Company; and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Henry A. Scandrett, Walter J. Cummings and George I. Haight, trustees, of interstate ore traffic originating on the Menominee Range in Michigan and Wisconsin, destined to Escanaba, Mich., for transshipment beyond, and of class and commodity traffic to and from points on the line of the Escanaba and Lake Superior Railroad Company, and for division of earnings thereon on terms and conditions set forth in said contract referred to in the report, be, and it is hereby, approved and authorized.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Finance Docket No. 11025

Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Trustees Abandonment of Operation

Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

IT IS HEREBY CERTIFIED, That the present and future public convenience and necessity permit the abandonment by Henry A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation, under trackage rights, over the Escanaba and Lake Superior Railroad Company's line of railroad in Dickinson, Marquette, and Delta Counties, Michigan, as described in the application and said report.

IT IS ORDERED, That this certificate and order shall take effect and be in force, as to the abandonment of operation herein authorized, from and after 30 days from its date. Affected tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

AND IT IS FURTHER ORDERED, That said trustees, when filing schedules canceling the tariffs shall in such schedules refer to this certificate by title, date and docket number.

By the Commission, division 4.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

SUPREME COURT OF THE UNITED STATES.

No. 415.—October Term, 1937.

Escanaba and Lake Superior Railroad Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, et al.	Appeal from the District Court of the United States for the Western District of Michigan.

[February 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the judgment of a specially constituted District Court[1] dismissing the appellant's bill which prayed relief against an order of the Interstate Commerce Commission approving and authorizing a proposed pooling agreement between two other railroads.[2] The single question presented is whether the appellant is a "carrier involved" within the meaning of Sec. 5 (1) of the Interstate Commerce Act.[3]

The appellant, hereinafter sometimes called "Escanaba", is a Michigan corporation operating a railroad which does business in intrastate and interstate commerce. Its line extends from Escanaba, Michigan, a port on Lake Michigan, northwesterly some sixty-three miles to Channing, which is on the northern border of the Menominee ore district. This district was reached in 1900, and still is served, by the lines of the Chicago and Northwestern Railroad Company (herein denominated "Northwestern") extending from the mines in a general southwesterly direction to the Northwestern's ore docks at Escanaba. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein called "Milwaukee") had in and prior to 1900 a line reaching the Menominee district but the ore shipped over this line went south to a connection with the Soo Line and thence eastward to a destina-

[1] 21 F. Supp. 151.

[2] 210 I. C. C. 599; 219 I. C. C. 285.

[3] Act of Feb. 4, 1887, c. 104, 24 Stat. 380, as amended by Transportation Act of Feb. 28, 1920, c. 91, Sec. 407, 41 Stat. 480, U. S. C. Tit. 49, § 5 (1).

tion other than Escanaba. Milwaukee and Escanaba entered into an agreement in 1900 whereby the former was to have trackage rights for its trains of iron ore from Channing to Escanaba, where the Milwaukee constructed its own ore docks for the lading of ore into lake steamers, and trackage rights for the return of its empty cars from Escanaba to Channing. On the footing of this contract Escanaba made a large investment in roadway suitable for the accommodation of Milwaukee's trains.

The details of the agreement are unimportant. It will suffice to say that Milwaukee had no right to carry passengers or freight, including ore, to intermediate points on the line of Escanaba; had no schedules for its ore trains; operated them by its own personnel and power, subject, however, to the control of the line by Escanaba's dispatchers and signal men. Milwaukee was to pay for the privilege a certain wheelage charge which, in no event, was to be less than $27,000 a year whether the total wheelage amounted to that sum or not; and was to pay certain other amounts towards the maintenance of Escanaba's line. A renewal of this agreement is now in force and will so remain until January 1, 1951.

Milwaukee's docks at Escanaba have fallen into disrepair. To avoid the large expenditure required to restore them, and to retain a share of the ore transportation, Milwaukee negotiated a pooling agreement with Northwestern under the terms of which ore consigned over either line from the mines to Escanaba will be routed over Northwestern's line and use Northwestern's docks at Escanaba and the ore business of both lines will be pooled on an agreed basis. Inasmuch as certain freight other than iron ore has been interchanged by Milwaukee with Escanaba at Channing and by Northwestern with Escanaba at Escanaba, and, as it is believed the ore pooling arrangement and discontinuance of Milwaukee's ore haulage over Escanaba's tracks may cause Escanaba to abandon the western end of its line, thus preventing the interchange of Milwaukee and Escanaba at Channing, it is further agreed that Milwaukee and Northwestern shall pool the receipts from interchange traffic exchanged by either of them with Escanaba, to recompense Milwaukee for possible loss of business resulting from the ore traffic pool. The two railroads, parties to the pooling agreement, submitted it to the Interstate Commerce

Commission for approval.[4] That body held that the proposed discontinuance of operation by Milwaukee over Escanaba's line under the trackage agreement amounted to an abandonment as defined by Sec. 1 (18) of the Interstate Commerce Act[5] and, without the Commission's approval of the abandonment, the pooling agreement could not become effective. The Commission, therefore, refused to pass upon it. Thereupon the parties resubmitted the pooling agreement together with a conditional application by Milwaukee for abandonment of its ore haulage over Escanaba. Escanaba intervened in the proceeding, and resisted the issue of an order of approval. A hearing was had at which not only Escanaba but many shippers and communities on its line presented evidence. The Commission made the findings required by Sections 1 (18) and 5 (1) of the Act, particularly that the proposed pooling arrangement and abandonment of the line by Milwaukee would promote the public interest and convenience and issued orders authorizing the proposed arrangement. Escanaba has abandoned the contention made in the District Court, and there overruled, that the Commission's findings are not supported by any evidence, and here attacks only the alleged error of law of the Commission and the court below in holding that it is not a "party involved" in the pooling agreement within the meaning of Section 5 (1), whose assent is necessary to the approval of the Commission.

Section 5 (1) of the original Interstate Commerce Act in sweeping terms forbade all pooling of freights of different and competing railroads and all agreements for division of aggregate or net proceeds of their earnings or any portion thereof. The Transportation Act, 1920, qualified this prohibition by excepting such arrangements as should have the specific approval of the Commission, and that approval was thus conditioned:

"That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, *if assented to by all the carriers involved,*

[4] They were represented before the Commission by their respective trustees appointed under Section 77 of the Bankruptcy Act.

[5] U. S. C. Tit. 49, § 1 (18).

such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises." (Italics supplied.)

The controversy revolves around the meaning of the phrase "if assented to by all the carriers involved." Escanaba insists that it is a carrier involved in the proposed agreement, and its assent is necessary to an affirmative order of the Commission. The appellees deny that it is such and the Commission and the District Court have held with them. We are of opinion that the decree of the District Court was right and must be affirmed.

First. The amendment of Section 5 (1) of the original statute by the Transportation Act, 1920, was one of the alterations made in the Act as a result of experience gained from unified operation of the railroads under federal control. The strict sanctions of the original Act, intended to preserve competition between carriers, were, in a number of instances, relaxed. Mergers and consolidations were authorized, pooling arrangements were to be permitted, extensions and abandonments were made lawful and divisions of joint through rates might be adjusted, all for the sake of economy and efficiency and the prevention of destructive competitive practices, and all subject to the supervision and control of the Interstate Commerce Commission, and its finding that the action proposed or ordered would be in the public interest. These amendments are to be given liberal construction in aid of the purposes Congress had in mind. Under the new provisions, Milwaukee and Northwestern might have merged or consolidated if the Commission found such a procedure would be in the public interest. Similar considerations would justify their proposed pooling of freight transportation. Shippers over Escanaba's lines, communities served by it, and, indeed, shippers in communities on distant lines and persons having no other interest than that of the general public welfare, were entitled to be heard before the Commission and to present whatever proofs might tend to show that the proposed agreement would or would not be for the public welfare. They, however, are not "carriers involved", mentioned in Section 5 (1). Escanaba had the undoubted right accorded it to appear and to be heard on the question of the public interest and welfare and indeed so had every carrier having connections with Milwaukee and Northwestern. The question involved in the

appellant's contention is whether it or any other carrier, not actually a party to the pooling agreement, is a "carrier involved" within the meaning of the Act, so that it may frustrate the agreement by withholding its assent.

Second. Escanaba is not a carrier of the ore which is hauled between Channing and Escanaba under the trackage agreement. It receives no part of the freight paid, it issues no bills of lading, it maintains no tariffs covering that transportation. It neither holds itself out to serve in that respect nor renders any service to shippers of ore; and, as respects the proposed pooling of freights on Milwaukee's traffic, exchanged with it at Channing, and Northwestern's traffic, exchanged with it at Escanaba, is not a carrier involved in the service rendered up to the exchange points, which is to be pooled. But it is said that the word "involved" connotes something more than a party to an agreement; that it embraces any railroad affected by the arrangement. And, it is urged, Escanaba will be seriously injured by the proposed arrangement, in spite of the continuing obligation of Milwaukee to pay it a minimum of $27,000 per annum until 1951.

If a carrier not a party, but adversely affected, is "involved" in the sense of Section 5 (1) Escanaba's assent is a condition precedent to authorization by the Commission. We must then determine the meaning of the phrase as used in the statute. Aid is afforded by the context. The section gives the Commission authority to approve and authorize, "if assented to by all the carriers involved, . . . under such rules and regulations, and for such consideration *as between such carriers* and upon such terms and conditions," as the Commission shall find just and reasonable. This reference to the mutual considerations to be exchanged by "such carriers" shows that Congress meant by the phrase "all the carriers involved," those, and those only, who are parties to the pooling of freights and the division of the proceeds. Escanaba, however, insists that if the section is to be construed to require the assent of none but the parties to the pooling agreement it is mere surplusage. It points out that Milwaukee and Northwestern have assented and are now merely asking the approval and authorization of the Commission. The argument, however, overlooks the fact that the Commission may authorize pooling on the application of a single carrier or upon its own initiative. In the first case the assent of one or more other carriers, and in the second the assent of all

the carriers is a prerequisite to its action. It appears, therefore, that though confined to the parties to the pool, the requirement that all carriers involved shall assent has a proper office in the statutory scheme.

Third. In view of Escanaba's relation to the traffic involved in the proposed pool, the decision that its assent is a prerequisite to the plan's operation would involve the gravest inconvenience and perhaps render the provision of Section 5 (1) nugatory. It is difficult to conceive of any pooling arrangement between two carriers which will not affect, in a greater or less degree, other carriers who interchange traffic with one or the other of the pooling roads, or with their connections. If the private interest of any such outside carrier should move it to refuse its assent to the arrangement it could, in the view urged by the appellant, veto the proposal although, on the whole and in the long view, the consummation of the plan might greatly enhance the economies of operation of large and important carriers and so promote the public interest. We cannot believe that every carrier, in such sense affected by a proposed pool to which it is not a party, was intended to have a status different from, and perhaps at war with, the interest of the general public in the efficient and economical operation of the railroads envisaged by the Transportation Act.

We conclude that not only the words of the statute but the obvious policy and intent underlying its provisions require an affirmance of the judgment of the District Court.

So ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.